

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In Re)	
)	In Bankruptcy
JOHN MICHAEL LYMAN)	
)	No. 92-40084
Debtor.)	
_____)	
)	
STEVE KELLEY)	
ESCH LAWN & GARDEN, INC.,)	
)	
Plaintiffs,)	
)	
v.)	Adversary No. 92-4093
)	
JOHN MICHAEL LYMAN,)	
)	
Defendant.)	

O P I N I O N

This adversary proceeding comes before the Court on the complaint of Steve Kelley and Esch Lawn & Garden, Inc. ("Kelley"), pursuant to 11 U.S.C. § 523(a)(2)(A) for a determination of the dischargeability of a certain contingent debt owed them by the Debtor, John Michael Lyman. For the reasons set forth below, the Court having considered all of the pleadings and evidence produced at trial by way of testimony, deposition of the Debtor and exhibits, does hereby find that the Plaintiffs have proven their cause of action and the contingent debt shall be declared nondischargeable.

PRIOR HEARING

On May 12, 1993, a hearing was held by U.S. Bankruptcy Judge D.E. Ihlenfeldt on issues common to this matter and another adversary complaint pending in this bankruptcy case, Patricia Lyman v. John Michael Lyman, adversary number 92-4097. The purpose of that trial was to

determine the validity and priority of Patricia Lyman's claimed lien on certain property located at 8041 South 13th Street, Oak Creek, Wisconsin ("Oak Creek property"). In a decision entered in this cause by Judge Ihlenfeldt on June 2, 1993, Judge Ihlenfeldt held that Patricia Lyman did in fact have a lien on the Oak Creek property, that her lien was properly recorded and, accordingly, Kelley's interest in the property was subject to Patricia Lyman's lien.

EVIDENCE ADDUCED AT TRIAL

Prior to December 18, 1989, John Lyman had an interest in real estate and a commercial building located at 8041 South 13th Street, Oak Creek, Wisconsin. His interest was held pursuant to a land contract that he had entered into with members of the Esch family. On December 18, 1989, Lyman assigned the land contract to Steve Kelley. The consideration consisted of the sum of \$98,886.17 paid by Kelley to John Lyman and also the assumption by Kelley of the balance of payments due to the Esch family on their contract with Lyman. In his answer to Kelley's adversary complaint to determine dischargeability, Lyman admitted entering into the assignment of land contract with Kelley.

Prior to the December 18, 1989, transaction between Lyman and Kelley, certain orders and stipulations had been entered in divorce proceedings pending in the state of Wisconsin involving John Lyman and his former wife, Patricia Lyman. Said divorce action is styled Patricia R. Lyman v. John M. Lyman, case number 532-948 and is still pending in the Milwaukee County Circuit Court, State of Wisconsin. On May 30, 1984, an order was entered in the divorce proceedings which provided that Patricia Lyman shall "have a lien against all of the real estate that is herein awarded to the respondent". The real estate referenced therein

included the Oak Creek property. Subsequently, on April 30, 1985, a stipulation to modify the May 30, 1984, order was entered which provided that until certain payments were made by John Lyman to Patricia Lyman, Patricia Lyman shall have a lien against all of the assets of John Lyman as a secured creditor. That stipulation was signed by John Lyman.

At the trial of this case, on June 13, 1994, the evidence presented consisted of exhibits, live testimony of Steven Kelley and the submission of the deposition of John Lyman which was taken on September 10, 1992.

In his deposition, Lyman acknowledged that he sold the Oak Creek property to Kelley for the sum of \$175,000.00. At the time the contract was signed, Kelley paid \$30,000.00 down and a further payment of \$68,000.00 was made at the time of closing. None of those monies were paid to Lyman's ex-wife. Lyman acknowledged that the Esch brothers were preparing to foreclose since he was behind in his payments to them and he was "desperate to salvage anything" out of the sale. Lyman acknowledged that he had executed a stipulation in his divorce case that had given his ex-wife a lien on the Oak Creek property. Nevertheless, he did not tell Mr. Kelley that his ex-wife had a lien on the property claiming that he did not remember that she had any lien. Just a few months later, in March, 1990, a second parcel of real estate was transferred by Lyman to Kelley. In the second transaction, Lyman contacted his ex-wife to advise her that the property would be sold and she was present at the closing and received a share of the sale proceeds. Mr. Lyman acknowledged that he did not notify his ex-wife of the impending sale of the Oak Creek property because his "back was against the wall", he was "going to lose everything" and he did not want to take the chance of his ex-wife disrupting the deal he had made with Kelley.

Steve Kelley testified at trial that he entered into an assignment of land contract with John Lyman wherein Lyman assigned his interest in the Oak Creek property to Kelley. During the discussions held between the two prior to the execution of the assignment of land contract Kelley asked Lyman whether the property was subject to any liens other than the lien held by the Esch family. Lyman denied the existence of any lien. Kelley also inquired of Lyman as to his marital status, and Lyman responded that he was an unmarried man. In the assignment of land contract executed by John Lyman, Lyman covenants that he has "good right to assign" the parcel of land in question. Mr. Kelley testified that he relied on Lyman's representations regarding the lack of any liens against the property except that held by the Eschs. Kelley also testified that he would not have entered into the land assignment contract with Lyman had he been aware of the lien imposed on the property in favor of Lyman's ex-wife.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon all of the testimony received by the Court, the Court finds that John Lyman, at the time he entered into the agreement with Steve Kelley, had knowledge of the meaning of the term "lien". The Court finds that Lyman had knowledge of the practical and legal effect of a "lien" imposed on real property. The Court finds that at the time he entered into the land assignment contract with Steve Kelley, Lyman had knowledge of the fact that a lien in favor of his ex-wife had been imposed on the Oak Creek property. The Court finds that Lyman had knowledge of the meaning of the phrase "give good title" when he entered into his transaction with Kelley. The Court further finds that Lyman's explanation that he simply forgot about his ex-wife's lien on the Oak

Creek property is not credible, particularly in light of the fact that he contacted his ex-wife in advance of the sale of the second parcel of land just a few months following the instant transaction and allowed her to share in the proceeds of that sale.

In order to establish his case of non-dischargeability of debt by reason of fraud the plaintiff must prove that false representations of material existing fact were made with the intent to deceive and with the knowledge that it was false and that such representation was believed and justifiably relied upon by the plaintiff with resultant damages. In re Scarlata, 979 F.2d 521, 525 (7th Cir. 1992); First Credit Corp. v. Myricks, 41 Wis.2d 146, 163 N.W.2d 1 (Wis. 1968); In re Garman, 625 F.2d 755 (7th Cir. 1980), 11 U.S.C. § 523(a)(2). The plaintiff must establish each element by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279 (1991).

The Court finds that it was not unreasonable for Kelley to rely on Lyman's representations that there were no liens against the Oak Creek property. The Court finds that Lyman's representations regarding liens against the property were false and untrue, that he knew said representations were false when he made them, that they were made with the intent to induce Kelley to enter into the assignment of land contract, that said representations were material to the transaction entered into, that Kelley entered into the contract in reasonable reliance on the representations made by Lyman and that Kelley would not have entered into said contract had he known the true facts regarding the existence of the lien in favor of Lyman's ex-wife. Accordingly, the Court finds that Steve Kelley and Esch Lawn & Garden, Inc. have proven, by a preponderance of the evidence, all of the elements necessary for a finding of nondischargeability of debt by reason of fraud.

This Opinion is to serve as Findings of Fact and Conclusions of
Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED: August 23, 1994

LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
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JOHN MICHAEL LYMAN,)	
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O R D E R

For the reasons set forth in an Opinion entered this day,
IT IS THEREFORE ORDERED that judgment be and is hereby entered
on the complaint of the Plaintiffs, Steve Kelley and Esch Lawn and
Garden, Inc., against the Defendant, John Michael Lyman, made pursuant to
§ 523(a)(2)(A) of the Bankruptcy Code and that the debt of the Defendant
is hereby declared nondischargeable.

IT IS FURTHER ORDERED that said debt is a contingent debt
inasmuch as Patricia Lyman has yet to foreclose on the property to
enforce her prior lien on said property. The debt this Court finds to be
nondischargeable shall include all sums of money incurred by Steve Kelley
and Esch Lawn and Garden, Inc. in defending the foreclosure suit which
may be subsequently brought by Patricia Lyman including any judgment
which may be rendered in favor of Patricia Lyman, court costs and
attorney fees and any and all other additional damages that can be proven

to have resulted from Patricia Lyman's foreclosure on her lien.

ENTERED: August 23, 1994

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE